Petition

Office-Supreme Court, U.S.
FILED
AUG 6 1981
ALEXANDER L. STEVAS,
CLERK

81-251
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NICK F. CIACCIO,
Petitioner,

versus

THE CITY OF DENISON,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED

The question presented in this Writ is whether punitive damages should be allowed in this case against the City of Denison, Texas.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

AUTHORITIES CITED iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING WRIT 3

CONCLUSION 7

CERTIFICATE OF SERVICE 9

APPENDIX

1. Decision of the District Court 1a
2. Decision and Mandate of the Court of Appeals 3a
3. Order on Motion for Rehearing, Fifth Circuit 11a
4. 33 U.S.C.A. Section 1342 ..... 12a

AUTHORITIES CITED

Page

Cases:

Lawton vs. Johnstone, 123 Okla. 145, 252 P. 393 6

Peace vs. City of Center, Texas, 372 F.2d 649 (5th Cir. 1967) 3

San Antonio River Authority vs. Garrett Brothers, 528 S.W.2d 266 (Error Refused n.r.e.) 5,6

Willet vs. Saint Albans, 69 Vermont 330, 38 Atlantic 72 6

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OCTOBER TERM, 1981

NICK F. CIACCIO,
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On Petition for a Writ of Certiorari to the
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For the Fifth Circuit

PETITION FOR CERTIORARI

Nick Ciaccio, Petitioner, prays that the United States Supreme Court review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on April 3, 1981, (Court of Appeals Opinion, *infra*, pp. 3a-10a) and the Order on Motion For Rehearing entered on May 11, 1981, (Order, *infra*, pp. 11a-12a) pertaining to the Court's denial of punitive damages awarded to Petitioner by the jury.

OPINIONS BELOW

The Order on Motion For Rehearing from the Court of Appeals is included in the Appendix beginning at page 11a. The opinion of the Court of Appeals is included in the Appendix beginning at page 3a. The opinion of the United States District Court for the Eastern District of Texas, Sherman Division, is included in the Appendix beginning at page 1a.

JURISDICTION

This case is brought on appeal pursuant to 28 *U.S.C.* 1254(1) (1966) from a final Order of the U.S. Court of Appeals for the Fifth Circuit.

STATUTE INVOLVED

The relevant portion of 33 U.S.C.A. Section 1342 is included in the Appendix at pages 12a-22a.

STATEMENT OF THE CASE

This is a suit against the City of Denison, Texas, for (1) an injunction to prevent the City's continued violation of its natural pollutant discharge elimination system permit; and (2) for damages to Petitioner's land resulting from discharges of sludge from the City's sewage treatment plant on to the Petitioner's land, brought under the pendent jurisdiction of the Court. The claim for injunctive relief was predicated on 33

U.S.C.A., Sec. 1342, et seq, and the claim for damages is a pendent state law claim. Prior to the trial the District Court entered a permanent injunction, pursuant to an agreement between the parties, against the City's future illegal discharge of pollutants. Petitioner's claim was tried before a jury which rendered a verdict for the Petitioner for actual damages of $74,250.00 and punitive damages of $20,000.00. The District Court entered judgment on the jury's verdict and the City appealed therefrom. On appeal the United States Court of Appeal for the Fifth Circuit affirmed the actual damage award of $74,250.00 plus interest from the date of judgment and overturned the $20,000.00 award of punitive damages. It is this ruling regarding punitive damages from which Petitioner takes this appeal. A motion for rehearing was filed by Petitioner and was denied on May 11, 1981, by the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

Petitioner Ciaccio knew from the start that the recovery of punitive damages against a municipality had to meet stringent tests. The jury issues were constructed in this case after reviewing the Texas cases and after a careful review of the Fifth Circuit's decisions, particularly, *Peace vs. City of Center, Texas*, 372 F.2d 649 (5th Cir. 1967).

The pertinent issues on punitive damages which were submitted to the jury were as follows:

Special Interrogatory No. 5

Do you find from a preponderance of the evidence that the City Council of the City of Denison concurred in or ratified the acts of municipal employees in permitting sludge to be deposited on Petitioner's land?

Answer "Yes" or "No".

Answer: Yes

Special Interrogatory No. 6.

Do you find from a preponderance of the evidence that, in concurring in or ratifying the acts of the municipal employees, the City Council acted without regard for, and with conscious indifference to, the rights of the Petitioner?

Answer "Yes" or "No".

Answer: Yes

The evidence to support these issues was as follows:

1. Mr. Ciaccio appeared before the City Council on several occasions to request that the City halt the pollution of his property by invasion of raw sewage and untreated sewage and sewage sludge.

2. Mr. Ciaccio took members of the City Council onto the property to show them the damage and let them view firsthand the vile, odorous and filthy substance covering his property.

3. Mr. Ciaccio gave the City Council written notice of his damage and his claim.

4. Considerable time passed between each of the above events and after some months and daily damage done to the property by the invasion of more sewage, Mr. Ciaccio filed suit to enjoin the City from operating their sewage disposal plant in this manner and only upon order by the Federal District Judge, Honorable William Wayne Justice, did they ever stop polluting or releasing untreated sludge and sewage upon Mr. Ciaccio's land.

In *San Antonio River Authority vs. Garrett Brothers*, 528 S.W. 2d 266 (Error Refused n.r.e.) the Court set up the requirement of concurrence in or ratification of the offending acts by the municipal governing body as a prerequisite to recovery of punitive damages against the City. Thus, the Petitioner submitted the issue referred to above inquiring as to ratification and concurrence and the jury found the City Council had ratified and concurred in the illegal acts satisfying this standard.

Other jurisdictions have recognized what appears to be an exception to or at least a modification of the rule that the allowance of exemplary or punitive damages against a municipality is barred by public policy. These cases have held that while ordinarily a municipal corporation is not subject to the penalty or example of such damages, where there has been a concurrence in

or ratification of the wrongful acts committed by the agents of the municipality on the part of the governing body of the City, such damages may be allowed. This was the holding in *San Antonio vs. Garrett Brothers* and such has also been the holding in *Willet vs. Saint Albans,* 69 Vermont 330, 38 Atlantic 72, which was an action against a village for damages from the negligence of the trustees in failing to cause the municipalities sewers to be properly connected, whereby noxious gases from the accumulation of sewage near petitioner's property escaped upon his property and entered his dwelling house. It was held that even if mere neglect on the part of the city's trustees to act constituted a wrong for which exemplary damages were recoverable, in order for such damages to be allowed against the municipality itself, it should first appear that the city in some way either authorized or subsequently approve the wrongful act or neglect. In *Lawton vs. Johnstone,* 123 Oklahoma 145, 252 P. 393, it was held (in an action for damages for impairing the value of petitioner's land through wrongful disposal of sewage) that since it did not appear that there was a failure to correct the defective situation, which apparently stemmed from mismanagement of the sewage disposal, within a reasonable time, a judgment for exemplary damages was not warranted. The instant case is clearly distinguishable from the facts in *Lawton vs. Johnstone.* In that case, it did not appear that there was a failure to correct the defective situation within a reasonable time and in the instant case, an attempt to correct the situation was never undertaken by the city. The record here shows

the many pleas on the part of Mr. Ciaccio to halt the damage to his property. Rather than take remedial action, it took a court order from a Federal Court to halt damage after the passage of a totally unreasonable time, and many requests made to the City to halt the pollution.

It is the Petitioner's belief that the issue presented in this case is so substantial and important that it should be reviewed by the United States Supreme Court. The facts concerning the illegal and continued pollution on Petitioner's property by the City of Denison are so compelling that the result of this decision allows unlawful pollution to go unchecked, and allows a city to go unpunished for knowingly and continually damaging a citizen's property. The continued damage to Mr. Ciaccio's property is the most extreme example imaginable of a municipality running roughshod over the rights of property owners. If this decision is allowed to stand, the effect of it is to abolish the right to obtain punitive damages against a municipality corporation regardless of the conduct of said city of its governing officials.

CONCLUSION

It is Petitioner's belief that the allegations, evidence, proof and jury findings in this case go far beyond that which has previously been held insufficient to merit the award of punitive damages. Petitioner believes that this is indeed the extraordinary case in which punitive damages should be allowed against a municipality. It

would be difficult to conceive of a more flagrant abuse of an individual's rights by a city than is present here and Petitioner believes that the issue presented in this case is so substantial as to merit consideration by the United States Supreme Court for its resolution.

Respectfully submitted,

KENNEDY, MINSHEW, CAMPBELL,
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(214) 893-4651

Charles Larry Cain
Attorney of Record for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that three copies of the above and foregoing Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit have been mailed to David Stagner, 204 W. Main, Denison, Texas, and Tom Ackins, M & P National Bank Building, Sherman, Texas, attorneys for Respondent, all by depositing the same in the United States Mails with proper postage affixed thereto, this the ____ day of August, 1981.

I further certify that all parties required to be served have been served.

Charles Larry Cain

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NICK F. CIACCIO

VS. NO. S-76-46-CA

THE CITY OF DENISON

JUDGMENT

This action came on for trial before the Court and a jury, Honorable William Wayne Justice, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, and the Court having directed the jury to find a special verdict upon all of the issues therein tried, and the jury having on the 28th day of September, 1977, found such verdict which was filed with the Clerk of this Court on the 29th day of September, 1977, and the Court having directed Judgment for the Plaintiff on such verdict in the sum of $94,250.00;

It is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff recover of and from the Defendant the sum of $94,250.00, with interest thereon at the rate of nine percent as provided by law, and his cost of action.

It is further ORDERED, ADJUDGED, and DECREED that Plaintiff, pursuant to the agreement of the parties and at the direction of the Court, shall pay to the Texas Veterans Land Board any and all sums due and owing by him to said Texas Veterans Land Board, from the proceeds of this action, which he is duly and legally obligated to pay under the terms of his contract with said Texas Veterans Land Board.

SIGNED and ENTERED this 28th day of February, 1979.

/s/ WILLIAM M. STEGER
United States District Judge

[Filed: March 2, 1979]

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 79-2873

NICK CIACCIO,
Plaintiff-Appellee,

versus

DENISON, TEXAS, THE CITY OF,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

(APRIL 3, 1981)

BEFORE AINSWORTH, and SAM D. JOHNSON, Circuit Judges, and HUNTER, District Judge*.

PER CURIAM:

This is a suit against the City of Denison, Texas, for (1) an injunction to prevent the City's continued viola-

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* District Judge of the Western District of Louisiana, sitting by designation.

tion of its Natural Pollutant Discharge Elimination System Permit; and (2) damages to plaintiff's land resulting from discharges of sludge from the City's sewage treatment plant onto plaintiff's land. The claim for injunctive relief is predicated on 33 U.S.C. §1251 *et seq.*, and the claim for damages is a pendent state law claim. Prior to trial, the district court entered a permanent injunction, pursuant to an agreement between the parties, against the City's future illegal discharge of pollutants. The pendent claim was tried before a jury, which rendered a verdict for plaintiff for actual damages of $74,250 and punitive damages of $20,000. The district court entered judgment on the jury's verdict, and the City appeals.

The City argues that, under Texas law, punitive damages cannot be awarded against a municipality, and that the district court therefore erred in awarding plaintiff exemplary damages in the amount of $20,000. Relying upon the jury's findings that the City Council concurred in or ratified the acts of the municipal officials in permitting sludge to be deposited on plaintiff's land, and that in so doing, the Council acted without regard for and with conscious indifference to plaintiff's rights, plaintiff argues that the award of exemplary damages was proper under this Court's decision in Peace v. City of Center, Texas, 372 F.2d 649 (5th Cir. 1967).

In *Peace*, plaintiffs sought to recover for damages to their land that was occasioned by the City's decision to

raise the level of an adjoining lake. Plaintiffs alleged that "by reason of the unlawful and grossly negligent manner of Defendant and total disregard of Plaintiffs' rights," plaintiffs should be awarded exemplary damages. This Court stated that

> [i]n order to recover punitive or exemplary damages against a municipal corporation under the law of Texas, which is here controlling, it must be pleaded and proved that the acts giving rise to the claim were committed with such malice or evil intent, or such gross negligence as to be equivalent to such intent.

citing Town of Jacksonville v. Pinkard, 40 S.W. 2d 841 (Tex. Civ. App. — Texarkana 1931, writ dis'd); Bassham v. Evans, 216 S.W. 446 (Tex. Civ. App. — Amarillo 1919, no writ); Ostrom v. City of San Antonio, 77 S.W. 829 (Tex. Civ. App. — San Antonio 1903, writ ref'd). Applying this test, the Court held that plaintiff did not plead "such [a] state of circumstances as would permit the recovery of punitive damages." 372 F.2d at 650.

Subsequent decisons of the Texas courts generally have taken an even more restrictive approach to the question of municipal liability for exemplary damages. In Cole v. City of Houston, 442 S.W.2d 445 (Tex. Civ. App. — Hou. [14th Dist.] 1969), the court, citing *inter alia*, the cases relied upon by this Court in *Peace*, rejected

plaintiff's claim for exemplary damages by noting that the general rule precludes such awards against municipalities. 442 S.W. 2d at 451. Similarly, in Moody v. City of Galveston, 524 S.W. 2d 583 (Tex. Civ. App. — Hou. [1st Dist.] 1975, writ ref'd, n.r.e.) the court stated that, "[i]t is a rule of general application that exemplary damages cannot be recovered against a municipal corporation," and concluded that, in any event, plaintiffs had failed to prove "that the acts complained of were the result of a conscious indifference to the rights or welfare of others." 524 S.W. 2d at 590.

In San Antonio River Authority v. Garrett Brothers, 528 S.W.2d 266 (Tex. Civ. App. — San Antonio 1975, writ ref'd, n.r.e.), the court examined the authorities relied upon by this Court in *Peace*, and disagreed that they supported the conclusion that, under Texas law, punitive damages against a municipality are recoverable upon a showing that the acts of which plaintiff complains were "committed with malice, evil intent, or negligence so gross as to be equivalent to evil intent." 528 S.W.2d at 180. The court, however, found it unnecessary to declare an absolute prohibition against awards of exemplary damages against municipalities in every case, because it concluded that, at the very least, concurrence in or ratification of the offensive acts by the governing body of the city must be proven, and that no such showing was made in that case.

Finally, in City of Katy v. Waterbury, 581 S.W.2d 757 (Tex. Civ. App. — Houston [14th Dist.] 1979), the court stated the rule that "a municipal corporation . . . cannot generally be liable for exemplary damages where there does not appear to be such willfulness, wantonness, malice or gross negligence committed by it," *citing* Moody v. City of Galveston, 524 S.W.2d at 590; Cole v. City of Houston, 442 S.W.2d at 451. The court further explained that "[t]he facts have not raised this degree of negligence. The City of Katy is a municipality which except in the most vindictive of circumstances cannot be held liable for exemplary damages." 581 S.W.2d at 761.

Although the foregoing decisions approach the question of municipal liability for exemplary damages in various ways, they all evince a strong reluctance on the part of Texas courts to hold municipalities liable for exemplary damages. Indeed, in none of the cases cited was such an award actually made. Moreover, the more recent decisions, particularly *City of Katy*, reveal that although the Texas courts heretofore have not found it necessary to declare an absolute rule prohibiting such awards, it indeed would be an exceptional case in which such an award would be upheld. As the court's decision in *Garrett Brothers* makes clear, more is required than the minimum necessary to justify an award of exemplary damages against a private individual. 528 S.W.2d at 280. The present case simply fails to demonstrate the level of "vindictiveness" that *City of Katy* requires. Indeed, it does not appear that the City's conduct in the

case *sub judice* was any more culpable than that held insufficient by this Court in *Peace*. Consequently, the award of exemplary damages against the City in the case *sub judice* must be reversed.

The City raises other arguments, which essentially relate to (1) plaintiff's compliance with the city charter notice requirement; and (2) the district court's refusal to order a new trial after the judge before whom the case was tried recused himself and was succeeded by another judge. Having examined the record and the City's arguments, we find no error on the part of the district court. Finally, the City argues that the district court improperly asserted pendent jurisdiction over the state law claim for damage to plaintiff's land. We find this argument to be devoid of merit.

The judgment of the district court awarding $20,000 in punitive damages against the City is reversed; in all other respects, the judgment of the district court is affirmed.

AFFIRMED IN PART; REVERSED IN PART.

[Filed: June 8, 1981]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2873

D. C. Docket No. S-76-46-CA

NICK CIACCIO,
Plaintiff-Appellee,

versus

DENISON, TEXAS, THE CITY OF,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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Before AINSWORTH, and SAM D. JOHNSON, Circuit Judges, and HUNTER*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

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* District Judge of the Western District of Louisiana, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part;

IT IS FURTHER ORDERED that each party shall bear his own costs on appeal, to be taxed by the Clerk of this Court.

April 3, 1981

ISSUED AS MANDATE: May 21, 1981

A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
/s/ PEGGY KELLER
Deputy

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2873

NICK CIACCIO,
Plaintiff-Appellee,

versus

DENISON, TEXAS, THE CITY OF,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITIONS FOR REHEARING
(May 11, 1981)

Before AINSWORTH and SAM D. JOHNSON, Circuit Judges, and HUNTER*, District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

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* Senior Judge from the Western District of Louisiana, sitting by designation.

ENTERED FOR THE COURT:
/s/ SAM D. JOHNSON
United States Circuit Judge

CLERK'S NOTE: See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate

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APPENDIX 4

§1342. National pollutant discharge elimination system — Permits for discharge of pollutants

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h)(2) of this title, or the date of approval by the

Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

State permit programs

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which —

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharg-

ing pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

Suspension of federal program upon submission of State program; withdrawal of approval of State program

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(h)(2) of this title. If the Administrator so

determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(h)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

Notification of Administrator

(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under

subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

Waiver of notification requirement

(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

Point source categories

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources

Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

Federal enforcement not limited

(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

Public information

(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

Compliance with permits

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information

reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

June 30, 1948, c. 758, Title IV, §402, as added Oct. 18, 1972, Pub.L. 92—500, §2, 86 Stat. 880.

Legislative History. For legislative history and purpose of Pub.L. 92—500, see 1972 U.S. Code Cong. and Adm. News, p. 3668.